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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 987

THE MOTOR CONVOY, INC., and
NATIONAL TRUCKING COMPANY,
Appellants,
v.
THE UNITED STATES OF AMERICA and
THE INTERSTATE COMMERCE COMMISSION,
Appellees,
NATIONAL AUTOMOBILE TRANSPORTERS
ASSOCIATION,
Intervening Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA,
ATLANTA DIVISION

MOTION TO AFFIRM, NOTICE THEREOF, BRIEF IN SUPPORT, AND CERTIFICATE OF SERVICE FILED ON BEHALF OF INTERVENING APPELLEE, NATIONAL AUTOMOBILE TRANSPORTERS ASSOCIATION

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NOTICE OF HEARING

To All Parties of Record:

Please take notice that the appended Motion to Affirm the Final Order and Judgment of the United States District Court for the Northern District of Georgia, Atlanta Division, entered on November 24, 1964, will be brought on for hearing at the discretion of the United States Supreme Court.

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Detroit, Michigan 48226.

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MOTION TO AFFIRM

Comes now, National Automobile Transporters Association of Detroit, Michigan, an Intervening Appellee herein, and moves the Court to affirm the final order and judgment of the United States District Court for the Northern District of Georgia, Atlanta Division, entered on November 24, 1964, from which the appeal in the above-entitled cause purports to have been taken, on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument. This motion is filed under Supreme Court Rule 16, 1, (c).

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BRIEF IN SUPPORT OF MOTION TO AFFIRM

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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ATLANTA DIVISION

BRIEF IN SUPPORT OF MOTION TO AFFIRM

Intervening Appellee, National Automobile Transporters Association, files this its Brief in Support of its Motion to Affirm the Judgment and Order of the three-judge Federal Court, review of which is sought in the proceeding above captioned, and in support thereof respectfully shows:

I. DECISION FOR REVIEW

The final order and judgment of the United States District Court for the Northern District of Georgia, Atlanta Division, entered on November 24, 1964, and here sought

to be reviewed by Appellants, is reported in 235 F. Supp. 250 and a true copy thereof is appended to Appellant's Jurisdictional Statement identified as Appendix "A" thereto.

II. APPELLATE JURISDICTION

The jurisdiction of this Court to review such final order and judgment is acknowledged by this Intervening Appellee.

III. INVOLVED STATUTES

The Federal statutes involved are:

1. The Interstate Commerce Act, 49 USCA 301 (307).
2. The Administrative Procedure Act, 5 USCA 1001 (1007 b).

IV. QUESTION PRESENTED FOR REVIEW

1. Whether the questions on which the decision of the cause depends are so unsubstantial as not to need further argument. This Intervening Appellee says: "Yes!"
2. Whether the three-judge Court committed reversible error in refusing to set aside the orders of the Interstate Commerce Commission in Docket MC-88300 dated October 7, 1963, January 20, 1964, February 20, 1964 and Certificate of Public Convenience and Necessity issued to Dixie Transport Company on March 11, 1964. This Intervening Appellee says, "No!"

V. CONCISE STATEMENT OF THE CASE

On January 17, 1963; Dixie Transport Company filed a Petition with the Interstate Commerce Commission seek-

ing modification of a Certificate of Public Convenience and Necessity issued to it by the Commission on October 26, 1939 in Docket No. MC-88300. The Appellants in the instant litigation filed replies in opposition to the relief requested in such Petition and one of the Appellants, National Trucking Comapny, requested oral hearing on the Petition.

On October 7, 1963, in Docket No. 88300, the Commission entered an Order providing for modification of the Dixie Transport Company certificate and rejecting the request for oral hearing. The Order contained an express finding "That the present and future public convenience and necessity require that certificate No. 88300, dated October 26, 1939, be modified as set forth in the following paragraph;". The latter finding was in turn based upon the observation of the Commission in said Order, as follows:

> "*It further appearing,* that in its Report and Order in *National Auto. Transporters Assn.—Declaratory Order, N.A.T.A.*, 91 MCC 395, (decided October 15, 1962), the Commission, *inter alia,* (a) determined that motor carrier holders of 'initial' and 'secondary' authority to transport automobiles should be placed in a position to be able to continue to participate in the transportation of certain traffic they enjoyed prior to the advent of trailer-on-flatcar and multi-level rail car service, and (b) outlined a procedure for modifying the certificates and permits of such motor carriers;"

Appellants thereupon filed Petitions for Reconsideration, a request for determination and announcement that the proceeding involves an issue of general transportation importance, a request for oral hearing and other relief, to which Dixie Transport Company replied. This Intervening Appellee, National Automobile Transporters Asso-

ciation, filed a Petition for Leave to Intervene embracing a tendered reply to the petitions of the Appellants.

On January 20, 1964, the Commission entered a further order in Docket No. 88300 permitting the Intervening Appellee, National Automobile Transporters Association, to intervene in the cause and accepting the tendered pleadings of National Automobile Transporters Association. All relief prayed for by the Appellants was denied in said order on a number of stated grounds including the following:

> "d. That Protestants have not shown what, if any, evidence will be offered if an oral hearing were held; (e) that the statements and arguments of position by Protestants does not require any different conclusion than that reached in the said order of October 7, 1963; and (f) that it does not appear that an oral hearing is necessary or desirable for a proper disposition of the proceeding;"

On February 20, 1964, the Commission entered a further order in Docket No. MC-88300 denying a Petition for determination and announcement that the proceeding involves an issue of general transportation importance stating "that, in the judgment of the Commission, no issue of general transportation importance is involved". On March 11, 1964, the Certificate of Public Convenience and Necessity modified in conformity with the language of the Commission in its order of October 7, 1963, was issued to Petitioner, Dixie Transport Company, in Docket No. MC-88300.

On April 15, 1964 the Appellants here, together with Florida Convoy, Inc., filed a Complaint in the United States District Court for the Northern District of Georgia, Atlanta Division, against the United States of America and the Interstate Commerce Commission seeking to enjoin, annul, and set aside the foregoing orders of the Commis-

sion together with the modified certificate. The action was docketed as Civil Action No. 8872. The government and the Commission replied and this Intervening Appellee sought and secured permission to intervene and to file its Reply. The issues were briefed and argued in open court and this Intervening Appellee participated both in the briefing and in the oral argument.

On October 2, 1964 the three-judge court entered a judgment upholding the action of the Commission and stating in part "we are not ruling that the Commission was compelled to grant Dixie's application, but only that it was authorized in so doing", etc. On November 24, 1964 the Opinion of the three-judge court was amended. Motion of Appellants for rehearing, re-argument and reconsideration was denied. Notice of Appeal was filed on January 14, 1965.

VI. SUMMARY OF ARGUMENT

The *Motor Carrier Act*, Part II of the *Interstate Commerce Act*, provides certain statutory criteria which must be met before the Interstate Commerce Commission can issue a Certificate of Public Convenience and Necessity. If these criteria are met, the certificate must issue subject to such restrictions or conditions as the Commission, in its discretion, may deem necessary in the public interest either at the time of issuance of the authority or subsequently. If these criteria are not met, no certificate may issue.

The statute is silent, however, as to the procedural criteria for the receipt of evidence upon which the statutory criteria may be met. This is left to the discretion of the Commission and in many instances the Commission issues, or refuses to issue, a Certificate of Public Convenience and

Necessity on facts of record introduced in the form of verified statements and without oral hearing.

In Docket No. MC-C-3024 entitled "*National Automobile Transporters Association—Declaratory Order*", decided on October 15, 1962 and reported in 91 M.C.C. 395, the Commission established a procedure for modification of Certificates of Public Convenience and Necessity on petition of the holder thereof under special circumstances. These circumstances involve any instance in which the holder of a Certificate of Public Convenience and Necessity to transport new automobiles in interstate commerce, but restricted to the movement of such traffic in "initial" movements from point of manufacture or assembly to ultimate destination, was faced with the loss of such traffic by reason of utilization of rail carrier trailer-on-flatcar or multilevel service for a portion of the transportation. The intervention of the rail service in conjunction with motor carrier service would break the continuity of the initial movement and thus require possession and utilization of "secondary" movement authority. The terms "initial" and "secondary" authority were theretofore defined by the Commission's Bureau of Motor Carriers in Administrative Ruling No. 75, and consistently followed thereafter by the Commission.

Dixie Transport Company filed a Petition for modification of its certificate in Docket No. MC-88300 which, in the opinion of the Commission, met the procedural criteria established in *National Automobile Transporters Association—Declaratory Order*, cited *supra*. Appellants in the instant litigation opposed the Dixie Transport Company Petition unsuccessfully and were unsuccessful in securing oral hearing, reconsideration, or a declaration that the issue was one of major transportation importance. So failing, they sought judicial review by Complaint filed in

the United States District Court, Northern District of Georgia, Atlanta Division.

In justifying its action in the Dixie Transport case the Commission found that the Dixie Transport Petition met the procedural criteria established in *National Automobile Transporters Association—Declaratory Order*, cited *supra*, and that the Protestants there, Appellants here, had introduced no evidence in their pleadings refuting any of the facts established by the Dixie Transport Company's sworn petition. In sustaining the Commission's position the three-judge district court made the same finding.

Although participants in the *National Automobile Transporters Association—Declaratory Order* proceeding as Protestants, the Appellants here have not sought judicial review of the latter decision, nor has anyone else. While the instant litigation appears to constitute a direct attack on the Commission's action in the Dixie Transport case, it is in reality a collateral attack upon the procedural criteria established by the Commission in *National Automobile Transporters Association—Declaratory Order* and the appeal should be dismissed.

VII. ARGUMENT

Part II of the *Interstate Commerce Act*, 49 Stat. 543, 49 U.S.C.A. 301-327, establishes the power of the Interstate Commerce Commission to issue Certificates of Public Convenience and Necessity authorizing motor carriers to engage in the transportation of passengers and property in interstate or foreign commerce. The provisions of the Act and, in particular, the provisions of *Section 207(a)*, 49 U.S.C.A. 307(a), established certain statutory criteria to be met before a Certificate of Public Convenience and

Necessity may be issued by the Commission and, where such criteria are met, "a Certificate shall be issued to any qualified applicant therefor".

The Act is silent, however, with respect to the procedure to be employed by the Commission in the receipt of evidence which would tend to prove or disprove that an applicant for a Certificate of Public Convenience and Necessity was a qualified applicant and met the criteria of *Section 207(a)*, namely, the applicant's fitness, willingness, and ability to provide the proposed service in conformity with the provisions of the Act and the regulations of the Commission and the fact that the present or future public convenience and necessity required such certification in whole or in part. Discretion is reposed in the Commission to determine the necessary procedures in its administration of the provisions of the Act.

This Court has given recognition to the discretionary power of the Commission to establish procedural criteria in exercising its discretionary judgment to determine whether an applicant for operating authority has met the statutory requirements of *Section 207(a)*. *United States v. Pierce Auto Freight Lines*, 327 U.S. 515, 535-36 (1946); *Interstate Commerce Commission v. Parker*, 326 U.S. 60, 65 (1945).

The *Administrative Procedure Act*, 5 U.S.C.A. 1001, imposes no further limitation upon the Commission than the requirement that notice of the filing of an application for a Certificate of Public Convenience and Necessity be given to the general public with an opportunity afforded to interested parties to present their views and evidence in support of their views. Neither statute requires the Commission to hold a public hearing merely because one is requested by an interested party.

Neither the *Administrative Procedure Act* nor the *Interstate Commerce Act* requires the Interstate Commerce Commission to hold an oral hearing where, in the judgment of the Commission, all of the evidentiary facts upon which the issues of law can be determined are capable of presentation in the pleadings. *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 205 (1956). As will be noted hereinafter, there was no factual dispute in the Dixie Transport Company proceeding in Docket No. MC-88300 involving the Commission Orders reviewed by the three-judge District Court whose decision is here sought to be reviewed. There is no evidence of record that the affording of an oral hearing as requested by Appellants would have produced any factual evidence beyond that fully considered by the Commission in its disposition of the Dixie Transport Company Petition for modification of its certificate.

Responsive to a Petition filed with the Commission on June 27, 1960 by this Intervening Appellee, National Automobile Transporters Association, the Commission established certain procedures to be followed by motor carriers of new automobiles seeking modification of their then held operating authorities in order to enable them to coordinate their services with rail carriers in trailer-on-flatcar or multi-level-car service. Upon receipt of the Petition, the Commission gave it Docket No. MC-C-3024, gave public notice of the filing of the Petition, received pleadings and briefs from interested parties, including the Appellants in the instant litigation, held a hearing for the receipt of testimony and documentary evidence, issued a Tentative Report, accepted further responsive pleadings, and ultimately issued its Report and Order in MC-C-3024, entitled "*National Automobile Transporters Association—Declaratory Order*" on October 15, 1962, reported in 91 M.C.C. 395.

Judicial review of the latter decision has never been sought by the Appellants in the instant litigation, nor by anyone else. While some findings of the Commission in the *N.A.T.A.—Declaratory Order* case have been questioned by the Commission in a subsequent decision in *Ex Parte No. 230*, entitled *"Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders"*, decided March 16, 1964, and reported at 322 I.C.C. 301, the latter decision by the Commission is presently under judicial review before a three-judge Federal Court in Fort Worth, Texas and before a three-judge Federal Court in Chicago, Illinois and the Commission has stayed the effective date of its Order. Consequently, for all practical purposes the Commission's decision in MC-C-3024 is final.

In the *National Automobile Transporters Association—Declaratory Order* case, cited *supra*, the Commission found that motor carriers of automobile traffic holding "initial" authority could not transport such traffic from a rail terminus without modification of such operating authority so as to permit "secondary" operating authority within the meaning of those terms as defined in *Administrative Ruling No. 75*, promulgated by the Commission's Bureau of Motor Carriers in 1938 and thereafter followed by the Commission in numerous decisions. The Commission further found that without such modification many carriers were faced with a loss of the traffic which they were then enjoying by reason of the intervention of rail TOFC and tri-level car service; that this would have disastrous economic effects; and that it was in the public interest to permit modification of such certificates in those instances where a carrier could show by petition to the Commission that it had been engaged in the movement of traffic; that it had lost the traffic because of rail intervention and that the traffic was still available for movement by the Applicant in the event of such modification.

This is not the only instance in which the Commission has established procedural criteria for the solving of a particular problem in the transportation of particular commodities by specialized motor carriers. (See *Southern Tank Lines, Extension,* 82 M.C.C 65; 88 M.C.C. 127, 143 (1961).) This Court has recognized the broad authority of the Commission to exercise discretionary judgment in the highly specialized field of motor carriage of automobile traffic in *Alton Railroad Company v. United States,* 315 U.S. 115, 86 L. Ed. 586, 62 S. Ct. 432, stating that the weighing of the evidence "involves in part a judgment based on the characteristics of the highly-specialized transportation service involved * * * that function is peculiarly one for the Commission, not the courts".

Dixie Transport Company's Petition for modification of its certificate in Docket No. MC-88300 met the criteria or procedural methods suggested by the Commission in *National Automobile Transporters Association—Declaratory Order* and a finding to this effect is contained in the Commission's initial Order of October 7, 1963. In reviewing the Commission's action in the Dixie Transport matter, the three-judge Federal Court also recognized the controlling effect of the Commission's findings in the *National Automobile Transporters Association—Declaratory Order,* case as justification for the Commission's action on the Dixie Transport Petition for modification of its certificate.

In disregard of the relative merit of the position of Dixie Transport Company versus the position of the Protestants in the Dixie Transport proceeding, the Appellants here would seek reversal of the Commission's action on the technical contention that the Commission went beyond its statutory authority in granting relief to the Petitioner without adequate findings. However, this Court has found that it is sufficient on judicial review if the findings of the Commis-

sion, considered in composite, express in clear and understanding manner the Commission's conclusion. *Alabama Great Southern Railway Co. v. United States*, 340 U.S. 216, 95 L. Ed. 225, 71 S. Ct. 264.

While it might appear that Appellants in the instant litigation are merely attacking the action of the Interstate Commerce Commission in the Dixie Transport Company Petition and the affirmance of that action by the three-judge District Court, in actuality the Appellants are attacking the procedural criteria established by the Commission in *National Automobile Transporters Association—Declaratory Order* as is evidenced by one of the concluding paragraphs in Appellant's jurisdictional statement appearing on Pages 22 and 23 thereof. Appellants there take the position that all motor carriers holding "secondary" operating authority to transport motor vehicle traffic are in jeopardy if this type of certificate modification by the Commission is allowed to stand. This attempt to secure judicial review of the Commission's decision in the *National Automobile Transporters Association—Declaratory Order* case should be rejected. The decision of the three-judge District Court should be affirmed.

VIII. CONCLUSION

For the reasons indicated, this Intervening Appellee, National Automobile Transporters Association, respectfully prays that its Motion to Affirm the judgment of the three-judge District Court and reported at 235 F. Supp. 250 be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that true copies of the foregoing Motion to Affirm, Notice thereof, and Brief in Support of Motion have been served upon all parties of record in this proceeding in accordance with the Rules of Practice of the United States Supreme Court, namely:

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